UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
--X
CHRISTOPHER E. BROWN, CV-07-4811 (JFB) (ETB)

Plaintiff,

- against -

NASSAU COUNTY, a political subdivision of the state of New York, d/b/a NASSAU VETERANS MEMORIAL COLISEUM and SMG FACILITY MANAGEMENT CORPORATION, a New York Corporation and NEW YORK ISLANDERS HOCKEY Club, LP,

Defendants.
--X

MEMORANDUM OF LAW
IN SUPPORT OF
DEFENDANT, COUNTY OF
NASSAU'S MOTION FOR SUMMARY JUDGMENT

JOHN CIAMPOLI
Nassau County Attorney Designee
By: Andrew R. Scott
Deputy County Attorney
One West Street
Mineola, New York 11501
(516) 571-3013
Attorney for Defendant County of Nassau

PRELIMINARY STATEMENT

This memorandum of law in submitted in support of the motion by the Defendant, County of Nassau, seeking an order, pursuant to F.R.C.P. 56, granting it summary judgment dismissing the Complaint.

Plaintiff in this action alleges that he has attended events at the Nassau County Veterans' Memorial Coliseum (the "Coliseum") and that when doing so, he has encountered problems with handicap accessibility. However, Plaintiff's entire claim is premised on his expert's report that uses building standards for new or renovated buildings. Here, the Coliseum, constructed prior to 1972 provides accommodations to those with physical disabilities. Nassau County has provided program accessibility and, when requested, reasonable accommodation to such persons. The County has fulfilled its obligations under Title II of the Americans with Disabilities Act and summary judgment dismissing the Complaint should be granted.

FACTS

Pleadings

Plaintiff commenced this action by the filing of a summons and complaint. The original complaint named, as defendants, County of Nassau and SMG Corporation. The action was subsequently discontinued against the defendant, SMG, by stipulation and order dated October 15, 2008.

Thereafter, the plaintiff sought to amend the complaint. The application was granted and the plaintiff filed an amended complaint which named New York Islanders Hockey Club as an additional defendant. Given that the amended complaint did not change the substantive allegations against the defendant, County of Nassau, its allegations are discussed herein.

The amended complaint alleges two causes of action against Nassau County. The first (paragraphs 10 – 27 of the amended complaint) alleges that the County of Nassau has violated the provisions of Title II of the Americans with Disabilities Act. The second cause of action (amended complaint, paragraphs 28-37) alleges violations of the Rehabilitation Act (29 USC §794, *et seq*) against the County.

The County of Nassau answered the complaint and denied the substantive allegations of wrongdoing by the County.

The Nassau County Charter

Nassau County owns the premises in question. Pursuant to its Charter, a state law (amended to include the quoted provision, L. 1972, Ch. 883, effective June 8, 1972), the legislative intent and declaration of policy was:

> 1. The County of Nassau has constructed on land owned by it at Mitchel Field, an arena and exhibition hall to be known as the Nassau County Veterans Memorial Coliseum. The Coliseum will be the site of a wide variety of activities including athletic games, contests, spectacles, entertainment events, trade shows and exhibitions. The successful use and operation of the Coliseum requires the proper management and administration in such proprietary areas as promotion, booking, contract negotiations, ticket sales, crown management, labor relations, building and equipment maintenance and the granting of various concessions, In order to insure the necessary efficient and economical operation of the Coliseum, it is deemed essential to provide a greater amount of flexibility in dealing with the problems in the aforementioned areas. To provide such an efficient and economic operation is deemed to be in the best interests of the people of Nassau County.
>
> 2. Any contract, lease, rental agreement, license, permit, concession or other authorization entered into for the purposes of furthering the use and operation of the Nassau County Veterans Memorial Coliseum may grant to the person, firm or corporation contracting with the county, right to use, occupy or carry on activities in the whole or any part of such Coliseum, grounds, parking areas and other facilities of the Coliseum, (a) for any purpose or purposes which are of such a nature as to furnish to, or foster or promote among, or provide for the benefit of, the people of the county, recreation, entertainment, amusement, education, enlightenment, cultural development or betterment, and improvement of trade and

> commerce, including professional, amateur and scholastic sports and athletic events, theatrical, musical or other entertainment presentations and meetings, assemblages, conventions and exhibitions for any purpose including business or trade purposes, and other events of civic, community and general public interest and/or (b) for any business or commercial purpose incidental to the operation of such Coliseum, grounds, parking areas and facilities, or to the equipment thereof. It is hereby declared that all of the purposes referred to in this subdivision are for the benefit of the people of the county and the improvement of their health, welfare, recreation and prosperity, for the promotion of competitive sports for youth and prevention of juvenile delinquency, and for the improvement of trade and commerce and that such purposes are and shall continue to be deemed county and public purposes.

The Premises and the Lease

The defendant, County of Nassau, owns the premises known as the Nassau County Veterans' Memorial Coliseum. To accomplish the public purposes delineated in the Charter, the County entered into a lease, dated October 15, 1979, for an original term of ten (10) years commencing January 1, 1980 and thereafter could be extended for four (4) additional five (5) year terms. (Lease, Article I, page 3). The County subsequently agreed to a fifth option which, if exercised, would extend the lease term through July 31, 2015. By separate agreement, dated January 24, 1991, Spectacor Management Group ("SMG") was assigned the lease.

The lease's preamble tracks the language in the Nassau County Charter that the Coliseum's purpose is to foster, for the benefit of the people of the County, recreation, entertainment, amusement and the like. (Lease, first page) and therefore, the lease states:

> WHEREAS, it is deemed in the best interests and general welfare of County to accept the proposal of EMU [the original lessee] to lease and assume the operation of the Coliseum for the purposes hereinabove stated.

While the obligation to make all additions and modifications to the Coliseum remain with the County (Lease, Section 12.6), the tenant1 is to provide the County Budget Director with a schedule of such items that are reasonably anticipated so that the County may include such projects in its budget for the ensuing year. (Lease, Section 13.1).

The tenant's use and occupancy of the premises is to permit events of a nature and type that is generally similar but not limited to the type of events permitted by the County during its operation of the Coliseum. (Lease, Section 19.1).

Nassau County's Policies, Practices
And Procedural Guidelines

The defendant, County of Nassau, has developed policies and practices for use of its departments, agencies and entities in an effort to comply with obligations under the provisions of the Americans with Disabilities Act. Its stated purpose is:

> To ensure that all members of the public, including people with disabilities, are able to participate in and receive the benefits of Nassau County's services, programs and activities, including employment opportunities with Nassau County.

Americans with Disabilities Act, Policies, Practices & Procedural Guidance for Nassau County Departments, Agencies, and Entities, issued by the Nassau County Office for the Physically Challenged, Revised 1/05, p. 2. (the "Practices Manual"). The policy stated is that:

> The County of Nassau is committed to complying with the Americans with Disabilities Act (ADA), including all the provisions of Title II of the ADA, which protects the rights of the disabled to access state and local government services, programs and activities. Specifically, the County is committed to the following policy:
>
> No qualified disabled individual shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of Nassau County or employment by Nassau County, or be subjected to

1 The relationship created between the County and EMU is stated to be that of landlord-tenant. Lease, Section 24.1.21

> discrimination by Nassau County in employment or in County public services, programs and/or activities including, but not limited to legislative meetings, information materials, health and social services, employment, transportation, recreation and special events.

The Practices Manual sets forth Nassau County's plan for complying with the requirements of Title II of the ADA. The intent is to provide ways of apprising disabled individuals of their rights and establish clear, efficient and fair processes for such individuals to seek enforcement of those rights. The Practices Manual can request an accommodation by filing a request for accommodation describing the problem. Practices Manual, p.6. The request can be addressed to a specific "ADA Liaison" for a specific department or, if unknown, to the Director of the Nassau County Office for the Physically Challenged, Don Dreyer. Practices Manual, pp.6-7.

The procedures established require that a response is approved, the department shall provide the accommodation "without undue delay." Practices Manual, p.8. A procedure is also established for reconsideration of a determination in the event that a requestor is dissatisfied with the County's response. *Id*.

ARGUMENT

STANDARD OF REVIEW

The standards for summary judgment are well settled. Pursuant to Federal Rule of Civil Procedure 56(c), a court may not grant a motion for summary judgment unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see Globecon Group, LLC v. Hartford Fire*

Ins. Co., 434 F.3d 165, 170 (2d Cir. 2006). The moving party bears the burden of showing that he or she is entitled to summary judgment. *See Huminski v. Corsones*, 396 F.3d 53, 69 (2d Cir. 2005). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 122 (2d Cir. 2004); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (summary judgment is unwarranted if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

POINT I

The County has met its Obligations In providing Program Accessibility

The anti-discrimination provision of Title II of the ADA states, in pertinent part, that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. Title II defines "public entity" to include state and local governments, such as the City. *See* 42 U.S.C. § 12131(1)(A). The regulations implementing Title II explain the responsibilities of public entities in greater detail:

> A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.

28 C.F.R. § 35.150(a). The regulations contain several limitations, one of which provides that § 35.150(a) does not: require a public entity to take any action that it can demonstrate would result

in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. 28 C.F.R. § 35.150(a)(3).

The regulations make clear that §35.150(a) does not "necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a)(1). Furthermore, the regulations implementing Title II explain the responsibilities of public entities in greater detail: A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150(a). A public entity is not required to make each portion of the facility readily assessable; the issue is whether the facility, when viewed in its entirety, is readily accessible. *See*, *Pascuiti v. New York Yankees*, 87 F. Supp.2d 221, 223 (S.D.N.Y. 1999).

Here, the plaintiff's own expert's report establishes that there are facilities available to individuals with disabilities. On the expert's list of purported defects, it is acknowledged that there are "Handicap Seating Areas" and that "[t]he Coliseum has 4 wheelchair accessible seating sections, specifically in gate 4, 19, 12 and 15." ADA Confidential Report, p. 1 of 5, item 6. In addition, the report states that "All Wheelchair Seating areas are located on the same level and do not allow people with physical disabilities a choice of different seating options.: ADA Confidential Report, p. 1 of 5, item 7. "The report also states that Wheelchair Seating areas do not allow for seating of at least one companion next to each wheelchair seating area." ADA Confidential Report, p. 1 of 5, item 8.

Thus, while plaintiff concedes that the Coliseum, which was built prior to 1972, plaintiff complains that it must be modified because it is not in conformity with the strict requirements of the ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG")2, July 1, 1994. ADA Confidential Report, p. 5 of 5, third bullet. Plaintiff's reliance on the standards stated in the ADAAG is misplaced since the stated purpose of the ADAAG is for: scoping and technical requirements are *to be applied during the design, construction, and alteration of buildings and facilities covered by titles II and III of the ADA to the extent required by regulations* issued by Federal agencies, including the Department of Justice and the Department of Transportation, under the ADA. (emphasis supplied). Hence, by the regulations own provisions, they do not apply to an existing structure, like the Coliseum. *See, Disabled in Action of Metro. N.Y. v. Trump Int'l Hotel*, 2003 U.S. Dist. LEXIS 5145, *15 (S.D.N.Y. 2003)(applying regulations only to newly constructed and altered buildings); *Pascuiti v. New York Yankees, supra*, (standards set in 28 C.F.R. §35. provide only a comparison to establishing barriers to access).

Whatever guidance the regulations may provide in this instance, it is clear that program access requirements are less stringent than the standards set in the ADAAG. § 35.150 requires only that a public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.

Plaintiff's reliance on the ADAAG to make the determination that there are 127 items that require this Court to find a violation of the ADA neglects to consider whether the programs are accessible, but rather rigidly and mechanically applies the standards for new or altered buildings without consideration of whether this particular plaintiff was denied access to the programs offered at the Coliseum. Bent or missing signs, not a sufficient number of parking

---

2 The ADAAG is found at 28 C.F.R. Part 36, Appendix A.

spaces, the condition of the parking areas, items mentioned in the ADA Report of an inspection conducted on November 13, 2008, critique only the condition of the accommodations that have been made, not the fact that they do not exist. The facility is accessible, and the complaint acknowledges that plaintiff obtained access. The number and condition of the parking spaces do not alter the conclusion that the Coliseum is readily accessible.

The same applies to the inspection report of January 28, 2009. While the report states that the Coliseum would not pass ADA inspection for a new or renovated building, the report does not address the inescapable fact that plaintiff attended hockey games at the Coliseum, (Amended Complaint ¶¶ 12-14) and intends to do so in the future. Amended Complaint, ¶14. This is program accessibility. The fact that the report claims that there is inadequate handicap seating of that some of the bathrooms do not meet the standards for new buildings or that the counters at concessions are too high, does not render the program inaccessible, particularly where plaintiff has not requested any sort of accommodation.

Again, §35.150(a) does not "necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a)(1). When viewed in its entirety, the Coliseum is readily accessible to and usable by individuals with disabilities. *See*, 28 C.F.R. § 35.150(a). The defendant, County of Nassau has complied with its obligations under the Title II of the ADA, in that the programs offered at the Coliseum, which are offered as an accommodation to the public (See, County Charter) are accessible to individuals with disabilities.

POINT II

Plaintiff never requested Reasonable Accommodation

Disabled individuals are entitled to receive "reasonable accommodations" that permit them to have access to and take a meaningful part in public services and public accommodations. *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004). "Claims under Title II of the ADA and section 504 of the Rehabilitation Act are treated identically." *Tylicki v. St. Onge*, 297 F. App'x 65, 66 (2d Cir. 2008) (*citing Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003)). In order for a plaintiff to establish a *prima facie* violation under these Acts, [he] must demonstrate (1) that [he] is a qualified individual with a disability; (2) that the defendants are subject to one of the Acts; and (3) that [he] was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of [his] disability. *Harris v. Mills*, 572 F.3d 66, 73-74 (2d Cir. 2009) (quoting *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004)) (internal quotation marks omitted). The defendant, County of Nassau, does not contest that plaintiff is not a qualified individual or that it is not subject to the provisions of Title II of the ADA. The determinative question is whether plaintiff was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of [his] disability, the third prong of the test.

In order to prove discrimination under the third prong, plaintiffs have available three theories: "(1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation." *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 573 (2d Cir. 2003).

To establish a reasonable accommodation claim under the ADA**,** "the relevant inquiry asks not whether the benefits available to persons with disabilities and to others are actually equal, but whether those with disabilities are as a practical matter able to access benefits to which they are legally entitled." *Henrietta D.*, 331 F. 3d at 271. Indeed, "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers." *Id*. To accomplish such "meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Id*. To establish a reasonable accommodation claim under the ADA**,** "the relevant inquiry asks not whether the benefits available to persons with disabilities and to others are actually equal, but whether those with disabilities are as a practical matter able to access benefits to which they are legally entitled." *Id*.

In determining what constitutes "reasonable accommodations," the Courts look to federal regulations implementing both Title II and section 504 of the Rehabilitation Act. *See Meekins v. City of New York*, 524 F. Supp. 2d 402, 407 (S.D.N.Y. 2007).

Where a plaintiff seeks reasonable accommodation, he must show "that an effective accommodation exists that would render h[im] otherwise qualified," *Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 122 (2d Cir. 1999) (quoting *Borkowski v. Valley Cent. Sch. Dist*., 63 F.3d 131, 139 (2d Cir. 1995)), and that the defendants refused to make such accommodation, *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999).

Plaintiff has not alleged that Defendant has denied him any reasonable accommodation that he has requested, and thus fails to put Defendant on notice regarding what the Plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), abrogated in part by *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d

929 (2007)).) Here, Plaintiff has not substantively denied a specific accommodation. Without such an allegation, Plaintiff cannot make out a claim under either the ADA or the Rehabilitation Act. *Getso v. City Univ. of N.Y.*, 2009 U.S. Dist. LEXIS 108316, *11-12 (2009).

POINT III

Although Title III can be said to
Affect a Local Government's Obligations under Title II
The Report of Plaintiff's Expert fails to meet Plaintiff's Burden

Even where the Court to determine that the standards applicable to Title III cases (dealing with places of public accommodation) were applicable, in that it is suggested in the Title II Technical Assistance Manual states that "in many situations . . . public entities have a close relationship to private entities that are covered by title III, with the result that certain activities may be at least indirectly affected by both titles," it is clear that in this case, any such claim against the Defendant, County of Nassau, is without merit.

The degree of accountability for architectural barriers under Title III depends on whether the place of public accommodation was newly constructed and first occupied after January 25, 1993, underwent renovations or alterations that affect usability after that date, or existed prior to that date. See 42 U.S.C. §§ 12182(b)(2)(A)(iv), (v); 12183(a). Here, there is no dispute that the Coliseum existed prior to January 25, 1993 and therefore the ADA requires only that such facilities remove architectural and structural barriers if such removal is "readily achievable." 42 U.S.C. § 12182(b)(2)(A)(4); see 28 C.F.R. § 36.304(a). The term "readily achievable" is defined to mean "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9).

In establishing a disability discrimination claim, the plaintiff bears the initial burden of identifying both the existence of an architectural barrier and a method of removing that barrier that is "readily achievable." *Roberts v. Royal Atlantic Corp.*, 445 F. Supp.2d 239 (E.D.N.Y. 2006) (Plaintiff bears the burden of establishing that the modifications sought with respect to entry and access to the restaurant and its facilities are readily achievable). In meeting the second prong of this burden, a plaintiff "must consider the four factors identified in § 12181(9) and proffer evidence, including expert testimony, as to the ease and inexpensiveness of their proposed method of barrier removal." *Pascuiti, supra.*

There are two different kinds of defects identified in the Plaintiff's expert report, structural and non-structural. The first, *see, e.g.*, Items 4-116, are structural in nature. Under the terms of the lease (Lease, Section 12.6), with SMG, the County of Nassau is responsible for such conditions, if it is determined by law that repair or renovation is required. With regard to these items, however, Plaintiff has failed to establish any sort of a method of removing that barrier that is "readily achievable." Rather, for instance, Plaintiff's report states that an additional 117 such seats must be added (*see*, Inspection Report dated January 28, 2009, Item 6) but it does not state where, in this existing facility, such seats are to be added. Similarly, Item 7 states that the ADAAG requires that seating be available in differently priced seating areas, without considering the fact that the Coliseum is a bowl-shaped arena, with all of the accessible seating areas being located on ground level. With regard to these structural items therefore, Plaintiff has failed to even suggest any sort of method of removing these "barriers."

With regard to the non-structural items, such as vendor carts and ticket and concession counters (*see, e.g.*, Inspection Report dated January 28, 2009, items 1-5 and 68-108, there is not even a suggestion that these are the responsibility of the County. While the County owns the building, both the Charter and the Lease make it clear that vendors are hired and controlled by the former defendant, SMG. Presumably, SMG has a contractual arrangement with these vendors and could compel the vendors to comply with the provisions of the ADA. However, Plaintiff has discontinued this action against SMG, under undisclosed terms. Whether that settlement required new concession stands that complied with the provisions of Title III is known only to SMG and the Plaintiff. The County, under the terms of the lease, does not exercise control over the vendors and has no right to require otherwise.

CONCLUSION

In summary, Plaintiff cannot demonstrate that he, a qualified individual with a disability, was, by reason of such disability, excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Summary judgment should be granted the defendant, County of Nassau, and the Complaint dismissed.

Dated: Mineola, New York
February 26, 2010

John Ciampoli
Nassau County Attorney Designee

____
By: Andrew R. Scott
Deputy County Attorney
One West Street
Mineola, New York 11501
(516) 571-3013
Attorneys for Defendant County of Nassau

TO: Ku & Mussman, P.A
Attorneys for Plaintiff
11098 Biscayne Boulevard
Suite 301
Miami, Florida 33161

And

J. Justin Griffin, Esq.
64 Oriole Street
Pearl River, New York 10965